

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

GERARDO SANCHEZ-RAMIREZ,
Defendant.

No. CR-10-6041-FVS

ORDER DENYING MOTION TO
VACATE SENTENCE

THIS MATTER comes before the Court based upon Gerardo Sanchez-Ramirez's motion to vacate his 210-month prison sentence. 28 U.S.C. § 2255. Mr. Sanchez-Ramirez wants the Court to resentence him to a term of 120 months in prison. For the reasons set for below, the Court declines to vacate his sentence.

BACKGROUND

On February 11, 2010, law enforcement officers obtained a warrant to search a house in Pasco, Washington. Gerardo Sanchez-Ramirez was present in the house. The officers observed bills and items of personal property that indicated Mr. Sanchez-Ramirez lived there. In addition, the officers discovered 5.35 pounds of methamphetamine. Mr. Sanchez-Ramirez made a number of incriminating statements concerning the methamphetamine. Subsequent testing revealed that the methamphetamine was very pure. The purity of the drug indicated it

1 had yet to be "cut" for sale, which, in turn, suggested Mr. Sanchez-
2 Ramirez was a mid- to high-level distributor of methamphetamine. On
3 April 21, 2010, he was charged with the crime of possession of a
4 controlled substance with the intent to deliver it. 21 U.S.C. §
5 841(a)(1). He faced a mandatory minimum sentence of 120 months in
6 prison. 21 U.S.C. § 841(b)(1)(A). The advisory guideline range was
7 more severe. Preliminary calculations suggested Mr. Sanchez-Ramirez
8 had an adjusted offense level of 36. If, as appeared likely, he fell
9 in Criminal History Category II, the guideline range was 210 to 262
10 months. An attorney was appointed to represent Mr. Sanchez-Ramirez.
11 His first attorney arranged a "free talk" with representatives of the
12 United States. The "free talk" occurred on September 2, 2010. The
13 persons who interviewed Mr. Sanchez-Ramirez did not think he was being
14 entirely candid with them. Consequently, counsel for the United
15 States advised Mr. Sanchez-Ramirez's first attorney that the United
16 States would be recommending a prison sentence well above the
17 mandatory minimum. Mr. Sanchez-Ramirez was dismayed by this news,
18 and, apparently, he blamed the messenger (*i.e.*, his attorney) for the
19 United States' unwillingness to offer a more favorable sentencing
20 recommendation. The relationship between Mr. Sanchez-Ramirez and his
21 first attorney deteriorated to the point she could no longer serve as
22 his attorney. On September 14, 2010, a new attorney was appointed.
23 Mr. Sanchez-Ramirez's second attorney attempted to secure a sentencing
24 recommendation from the United States that was acceptable to Mr.
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1 Sanchez-Ramirez. The United States refused to change its position.
2 Thus, the second attorney, like the first, was forced to convey
3 unpleasant information to Mr. Sanchez-Ramirez. The information was
4 not well received.

5 Besides engaging the United States in plea negotiations, Mr.
6 Sanchez-Ramirez's second attorney also filed a number of motions,
7 including a motion to suppress the evidence that was sized in the
8 Pasco house. On December 7, 2010, the Court denied Mr. Sanchez-
9 Ramirez's suppression motion. Mr. Sanchez-Ramirez asked to speak to
10 the Court *ex parte*. He expressed his frustration with the United
11 States' unwillingness to make the concessions he sought. The Court
12 declined to become involved in plea negotiations.
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14 Trial was continued to February 7, 2011, and, then, to April 4,
15 2011. Mr. Sanchez-Ramirez had little hope of obtaining acquittal by
16 the jury, but, then again, he did not like the plea agreement the
17 United States was offering. He vacillated. At certain times, he said
18 he would plead guilty. At other times, he said he wanted a new
19 attorney. On March 31, 2011, he and his second attorney appeared
20 before the Court. Mr. Sanchez-Ramirez again expressed frustration
21 with the United States' unwillingness to offer more generous
22 concessions in exchange for a plea of guilty. The Court explained he
23 could either plead guilty or proceed to trial -- the choice was his.
24 Ultimately, Mr. Sanchez-Ramirez entered a conditional plea of guilty
25 that day. Fed.R.Crim.P. 11(a)(2). The Court carefully reviewed the
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1 proposed plea agreement with Mr. Sanchez-Ramirez. Then, and only
2 then, did the Court accept it. (Verbatim Report of Change of Plea
3 Hearing (ECF No. 162) at 27.)

4 Sentencing occurred on June 23, 2011. Mr. Sanchez-Ramirez did
5 not dispute that, based upon the quantity of methamphetamine for which
6 he was accountable, his base offense level was 38. Since he had
7 accepted responsibility for his offense by pleading guilty, the United
8 States agreed his offense level should be reduced by two levels under
9 U.S.S.G. § 3E1.1(a), but, since he had entered a conditional plea, the
10 United States refused to request a one-level reduction under §
11 3E1.1(b). Mr. Sanchez-Ramirez had three criminal history points, all
12 of which stemmed directly or indirectly from a prior conviction for
13 driving under the influence, so he fell within criminal history
14 category II. Given Mr. Sanchez-Ramirez's criminal history category,
15 and given his adjusted offense level, the guideline range was 210 to
16 262 imprisonment. The Court ordered him to serve 210 months in
17 prison.
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19 Mr. Sanchez-Ramirez appealed. The Ninth Circuit affirmed his
20 conviction and sentence on August 8, 2012. In doing so, the circuit
21 court upheld the constitutionality of the search of the Pasco house,
22 and the circuit court upheld the calculation of his guideline range.
23 Mr. Sanchez-Ramirez is in the custody of the Bureau of Prisons. On
24 June 21, 2013, he filed a motion seeking relief under 28 U.S.C. §
25 2255. He moves the Court to vacate his 210-month prison sentence and
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1 sentence him, instead, to a term of 120 months in prison. The United
2 States objects.

3 **RULING**

4 Mr. Sanchez-Ramirez cites a number of grounds in support of his §
5 2255 motion. Some of them overlap. In order to facilitate analysis,
6 the Court will combine some of his allegations:

7 Search of House

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9 Mr. Sanchez-Ramirez claims the search of the Pasco house was
10 unconstitutional. His second attorney raised this issue in a motion
11 to suppress, which this Court denied. On appeal, Mr. Sanchez-Ramirez
12 argued this Court erred by denying his suppression motion. The Ninth
13 Circuit was unpersuaded; rejecting Mr. Sanchez-Ramirez's argument.
14 The fact the Ninth Circuit considered, and rejected, his argument bars
15 him from relitigating the issue in a collateral attack upon his
16 conviction and sentence. "When a defendant has raised a claim and has
17 been given a full and fair opportunity to litigate it on direct
18 appeal, that claim may not be used as basis for a subsequent § 2255
19 petition." *United States v. Hayes*, 231 F.3d 1132, 1139 (9th Cir.2000)
20 (citing *United States v. Redd*, 759 F.2d 699, 700-701 (9th Cir.1985)).
21

22 Validity of Guilty Plea

23 Mr. Sanchez-Ramirez attacks the validity of his plea of guilty on
24 the ground he was misled by his second attorney. As Mr. Sanchez-
25 Ramirez points out, a plea must be knowing, intelligent, and
26 voluntary. See, e.g., *Loftis v. Almager*, 704 F.3d 645, 647 (9th

1 Cir.2012) (citations omitted). In *United States v. Hernandez*, 203
2 F.3d 614, 618 n.5 (9th Cir.2000), the Ninth Circuit explained the
3 difference between the "voluntariness" of a plea and the
4 "intelligence" of a plea:

5 [T]he "voluntariness" of a plea turns on the extent to which
6 a defendant is permitted to make a free choice among the
7 acceptable alternatives available at the plea stage. The
8 "intelligence" of a plea, on the other hand, turns on
9 whether the defendant's choice among those alternatives is
10 made with the information (and an understanding of the
information) necessary to choose intelligently between them.

11 Mr. Sanchez-Ramirez does not allege his attorney coerced him into
12 pleading guilty. Rather, he seems to be alleging his plea was not
13 intelligent because his second attorney wrongly assured him he would
14 receive a sentence well below the guideline range if he pleaded
15 guilty. There are several problems with this claim. To begin with,
16 it is highly unlikely Mr. Sanchez-Ramirez's second attorney ever gave
17 such an assurance. At hearings on both December 7, 2010, and March
18 31, 2011, his second attorney explained Mr. Sanchez-Ramirez was
19 exasperated by the United States' unwillingness to offer a sentencing
20 recommendation that Mr. Sanchez-Ramirez thought was appropriate. Mr.
21 Sanchez-Ramirez's exasperation with the United States strongly
22 suggests his attorneys provided him with accurate, though unpleasant,
23 information concerning the sentence he could expect to receive.
24 However, even in the unlikely event his second attorney was overly
25 optimistic, it is well established that an attorney's erroneous
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1 prediction concerning the sentence his client can expect to receive is
2 constitutionally deficient only if the prediction constitutes a "gross
3 mischaracterization" of the likely outcome of the a plea bargain and
4 the prediction is "combined with erroneous advice on the probable
5 effects of going to trial." *United States v. Keller*, 902 F.2d 1391,
6 1394 (9th Cir.1990) (internal punctuation and citations omitted). Mr.
7 Sanchez-Ramirez has offered no evidence even remotely suggesting
8 either circumstance occurred prior to his plea of guilty. Finally, at
9 the change-of-plea hearing on March 31, 2011, Mr. Sanchez-Ramirez was
10 reminded of the recommendation the United States would make at
11 sentencing:
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13 COURT: Concerning the length of imprisonment, the agreement
14 says the United States agrees to recommend the court
15 impose a sentence at the bottom of the guideline range
16 as determined by the court at the time of sentencing,
17 and you are free to argue for a mandatory minimum
18 sentence of not less than 120 months. Do you
understand that?

19 DEF.: Yes.

20 (Verbatim Report of Change of Plea Hearing at 17-18.) Given that
21 warning, Mr. Sanchez-Ramirez was on notice he could not assume that,
22 by pleading guilty, he would secure a sentence below the guideline
23 range.

24 Guideline Calculations

25 Mr. Sanchez-Ramirez seems to be claiming his second attorney
26 failed to provide constitutionally adequate assistance because, in Mr.

1 Sanchez-Ramirez's opinion, his second attorney should have challenged
2 the calculation of both his criminal history score and his adjusted
3 offense level. Mr. Sanchez-Ramirez's allegation of ineffective
4 assistance arises in the context of a non-capital sentencing
5 proceeding. In *Davis v. Grigas*, 443 F.3d 1155, 1158 (9th Cir.2006),
6 the Ninth Circuit questioned whether a claim of ineffective assistance
7 of counsel in a non-capital sentencing proceeding is governed by the
8 two-part test that the Supreme Court established in *Strickland v.*
9 *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
10 Assuming, for purposes of argument, the *Strickland* test does apply,
11 Mr. Sanchez-Ramirez must demonstrate both that his second attorney's
12 performance at sentencing was deficient and he suffered prejudice as a
13 result. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

15 Neither of Mr. Sanchez-Ramirez's complaints concerning the
16 calculation of his guideline range has merit. Turning, first, to his
17 criminal history score, the Presentence Investigation Report ("PIR")
18 stated he had been convicted in Franklin County (Washington) District
19 Court in 2008 of the crime of driving under the influence. He does
20 not deny the existence of this conviction. Thus, his second attorney
21 had no reason to challenge his criminal history score. Turning, next,
22 to Mr. Sanchez-Ramirez's adjusted offense level, he does not seem to
23 be attacking the calculation of his base offense level, which was 38.
24 Nor does he suggest the Court erred by reducing his base offense level
25 by two levels for acceptance of responsibility. His only complaint
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1 seems to be that his second attorney failed to challenge the United
2 States' decision not to request the "third point" under § 3E1.1(b).
3 If this is Mr. Sanchez-Ramirez's complaint, it is contradicted by the
4 record. The Ninth Circuit considered, and upheld, the United States'
5 decision not to request the "third point." Mr. Sanchez-Ramirez may
6 not relitigate the circuit court's ruling under § 2255.

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8 Mitigating Factors

9 Finally, Mr. Sanchez-Ramirez seems to be claiming his second
10 attorney failed to adequately present mitigating information at
11 sentencing. He says his second attorney should have emphasized the
12 following: his conduct was aberrant; a sentence of 210 months in
13 prison is excessively harsh when one compares that sentence with the
14 sentences other criminals receive for worse behavior; the fact he is
15 an illegal alien will increase the severity of his punishment; he is
16 truly remorseful; and he is unlikely to commit another crime. Given
17 Mr. Sanchez-Ramirez's allegations, the Court has reviewed the record
18 of the sentencing hearing. The record reflects his second attorney
19 forcefully argued for the mandatory-minimum sentence of 120 months.
20 Among other things, he noted that the instant offense is Mr. Sanchez-
21 Ramirez's first felony (his only other conviction was a DUI); that Mr.
22 Sanchez-Ramirez was being punished far more harshly than anyone else
23 who was involved in the crime; that Mr. Sanchez-Ramirez's children
24 would suffer as a result of his imprisonment; and that he had
25 attempted to cooperate. (Verbatim Report of Sentencing Hearing (ECF
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1 No. 161) at 15-23.) Looking back, it is always possible to identify
2 arguments a defense attorney might have made. However, the test is
3 not whether there are arguments Mr. Sanchez-Ramirez's second attorney
4 might have made, but whether his second attorney's performance at
5 sentencing was objectively unreasonable when measured by prevailing
6 professional norms. *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Mr.
7 Sanchez-Ramirez has failed to establish it was. The Court could stop
8 there. "Failure to meet either prong [of the *Strickland* test] is
9 fatal to a claim [of ineffective assistance] and there is no
10 requirement that [a reviewing court] 'address both components of the
11 inquiry if the defendant makes an insufficient showing on one.'" *Gentry v. Sinclair*, 705 F.3d 884, 899 (9th Cir.2013) (quoting
12 *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052). But in the interest of
13 completeness, the Court will press on. Even if Mr. Sanchez-Ramirez
14 had shown deficient performance, he still would have to demonstrate
15 prejudice. "With respect to a claim of ineffective assistance in
16 sentencing, the defendant must show a reasonable probability that, but
17 for counsel's substandard performance, he would have received a less
18 severe sentence." *Gonzalez v. United States*, 722 F.3d 118, 130 (2d
19 Cir.2013). At sentencing, Mr. Sanchez-Ramirez had to face a damning
20 circumstance. Namely, he previously had admitted that he had
21 possessed over five pounds of methamphetamine; methamphetamine that
22 was very pure -- so pure that its' very purity suggested he was a mid-
23 to high-level distributor. Nothing his attorney could have said or

1 done would changed that circumstance; and it was that circumstance
2 that weighed most heavily in the Court's decision to impose a sentence
3 of 210 months imprisonment. (Verbatim Report of Sentencing Hearing at
4 25-29.) Thus, there is no reason to think the outcome would have been
5 different had Mr. Sanchez-Ramirez's second attorney made the arguments
6 he claims his second attorney should have made. His claim of
7 ineffective assistance at sentencing fails.
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9 **IT IS HEREBY ORDERED:**

10 1. Gerardo Sanchez-Ramirez's motion for appointment of counsel
11 (**ECF No. 167**) is **denied**.

12 2. Gerardo Sanchez-Ramirez's motion to vacate his sentence (**ECF**
13 **No. 165**) is **denied**.

14 3. The Court declines to issue a certificate of appealability.

15 **IT IS SO ORDERED.** The District Court Executive is hereby
16 directed to enter this order and furnish copies to Gerardo Sanchez-
17 Ramirez and to counsel for the United States.
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19 **DATED** this 1st day of October, 2013.

20 s/ Fred Van Sickle
21 Fred Van Sickle
22 Senior United States District Judge
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